IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 208

GRAND TRUNK WESTERN RAILROAD COMPANY,
a Michigan corporation,
Petitioner,
vs.
ADEL PRECISION PRODUCTS CORPORATION,
a corporation,
Respondent

REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI

Your petitioner, Grand Trunk Western Railroad Company replies to respondent's opposing brief, as follows:

COUNTER-STATEMENT OF THE FACTS

Your petitioner takes exception to respondent's "Counter-Statement of the Facts" in the following respects:

At page 3, respondent says:

> "Counsel have omitted to add that the order bill of lading so erroneously mailed was *not endorsed* and that the original bill of lading did *not* contain the typewritten endorsement
>
> 'Adel Prec. Prod. Corp.'
>
> at the time of such mailing (R. 22-23). And the State Supreme Court found, page 522:
>
> 'There is no testimony that the endorsement, "Adel Prec. Prod. Corp." in typewriting was on the original when received by Hickman.' "

While petitioner claimed, at the trial, that the jury might properly have drawn the inference that Mr. Noon, Newkirk Manufacturing Company's Acting Shipping Clerk, in preparing the bill of lading, placed the typewritten endorsement thereon, petitioner concedes that the State Supreme Court correctly held, on appeal to that court, that the typewritten endorsement was not on the original bill of lading when received by Hickman Farm Supplies, Inc., nor does petitioner now question that holding before this court.

Petitioner again points out that the State Supreme Court, at page 522 of its opinion, also found:

> "Alton Graeff, general manager of Hickman, testified that he signed 'Hickman Farm Supp. Inc.,' and his own name underneath that of his company under the typewritten 'Adel Prec. Prod. Corp.' indorsement, before Exhibit No. 7 was delivered to defendant."

To avoid any possible confusion that might arise from the reference by respondent, in the first sentence hereinabove quoted, to "the order bill of lading" and "the original bill of lading", it seems appropriate to explain

that there is only one bill of lading involved in this lawsuit, which is the original order bill of lading, Exhibit 7.

At pages 3-4, respondent says:

> "The following, with respect to the endorsement, is an additional pertinent quotation from the opinion of the State Supreme Court, p. 524:
>
> > 'There was no proper endorsement on the order bill of lading, according to undisputed testimony, because the typewritten endorsement is clearly shown to have been unauthorized.' "

Your petitioner claims that the State Supreme Court was in error in concluding that, according to undisputed testimony, the typewritten endorsement was unauthorized. While conceding that, under undisputed testimony, there was no *specific authorization* of the typewritten endorsement by respondent, nevertheless petitioner claims that the undisputed testimony does show an implied authorization by respondent, arising from its own conduct and failure to take appropriate action after learning of the error of its agent, Newkirk Manufacturing Company, in forwarding the bill of lading direct to Hickman Farm Supplies, Inc., or that, in any event, respondent is now estopped to deny such authorization.

At page 4, respondent refers to an interpretation by its Credit Manager, Willard Allen, of the term "OPEN", saying:

> • • • "Respondent's credit manager testified that in his opinion the term 'OPEN' would 'not necessarily' mean open account (R. 36), that he did not so interpret it, and that when he issued shipping instructions he specified 'sight draft order bill of lading' (R. 30)." • • •

Although respondent's Credit Manager, Willard Allen, did express an opinion, in his testimony at the trial, that the term "OPEN" does not necessarily mean "open account" (R. 36), it is important to take note that he did not see the purchase order (Exhibit 12), prior to the time this shipment was made, and therefore it would have been impossible for him to interpret "OPEN" in the purchase order in specifying "sight draft order bill of lading" in the instructions he furnished Newkirk Manufacturing Company. He testified:

> "I know of the company known as the Hickman Farm Supply Company located in Lansing. *I knew of a shipment to them in about July of 1948. The original order I did not see at the time. The sales department handled it. I later saw an order from them,* and I learned that it involved some equipment that was manufactured by the Newkirk Company and was going to be shipped by them. *The transaction* came to my attention in determining the terms of the shipment. I specified the terms of the shipment. I specified sight draft order bill of lading" (R. 29-30). (Emphasis supplied.)

He also testified:

> "A. • • • *Exhibit 12 did not come into my hands prior to the time this shipment was made.*
>
> Q. Now, after 'terms' when it says 'open' it means open account, doesn't it?
>
> A. Not necessarily.
>
> Q. *This particular purchaser could well have understood it as saying 'open account', couldn't he?*
>
> A. *He could have understood it to say 'open account.'* " (R. 36). (Emphasis supplied.)

It should be noted from the above, that the witness Allen conceded that the purchaser (Hickman Farm Supplies,

Inc.) could have interpreted "OPEN" as saying "open account". That was the exact interpretation actually given by the purchaser, Hickman Farm Supplies, Inc. (R. 45, 57). That interpretation of the term "Open" in a purchase order is supported by the case of *Smith v. Landa*, 45 Tex. Civ. App. 446, 101 S. W. 470. In that case, the purchaser sued Landa, the seller, for loss alleged to have been suffered by reason of the seller's failure to comply with a purchase order alleged to have specified "shipper's order notify". The seller claimed that the purchaser had ordered the shipment "open". The Court, referring to these terms, said:

> "A shipment direct to the consignee without restrictions is called an 'open' shipment, and justifies the carrier in delivering to the consignee upon identification."

Further, respondent's Credit Manager, after the shipment had been made, interpreted this transaction as having been handled on an open account basis. Reference is made to his testimony at the trial, where he read, in part, a letter written by him on August 19, 1948, in which it was stated:

> • • • "It is true that this particular order came to you on an open account basis, but it was done through an error of an inexperienced clerk at the plant of Newkirk Manufacturing Company at Anaheim" (R. 34-35).

Subsequently, on September 28, 1948, he wrote a letter (Exhibit 13), stating in part:

> "On August 19, 1948 we wrote to you about the balance of $13,101.09 open on your account with us, with particular reference to the carload shipment which was made to you on July 30th on an open account basis" (R. 55).

In the footnote, at page 4, respondent asserts:

> "Interpretation of the phraseology of the purchase order by others is, therefore, immaterial. The rights between petitioner and respondent are fixed by the contract between them, i.e., the order bill of lading."

In the footnote at page 6, respondent quotes the surrender clause of the bill of lading, as follows:

> "The surrender of this Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the property."

We understand from the foregoing that it is the position of the respondent that a delivery by a carrier without compliance with the surrender clause of the bill of lading renders the carrrier liable for conversion without anything more. That is also the position taken by the State Supreme Court, at page 529 of its opinion (332 Mich. 519), in quoting from the syllabus in the case of *Keystone Grape Co. v. Hustis,* 232 Mass. 162 (122 N. E. 269). Petitioner claims that this was error.

At page 4 of respondent's brief appears the following:

> " 'On August 19 respondent replied demanding payment for goods delivered (R. 34-35). This letter, while not in evidence, is mentioned in a later letter, dated September 28, 1948, (Exhibit 13) • • • .'
>
> "*Actually the letter of reply of August 19, 1948 above referred to, does appear in evidence as Exhibit 17* (R. 47, 48, 49, 50), does not demand payment and states in part" • • • (followed by a quotation from Exhibit 17.) (Emphasis supplied.)

A careful examination of the record would have disclosed that respondent wrote two letters on August 19, 1948. Exhibit 17 was signed by respondent's General Sales Manager (R. 47-50). This was Mr. Gardner (R. 32-33). The other letter of August 19, 1948, was written by Willard Allen, then respondent's Credit Manager (R .29). He testified with respect to this letter, as follows:

> "Now, after I learned that the original bill of lading had gone forward to the Hickman Supplies, I did write a letter to them saying that it had been sent in error or through a mistake. I don't recall the exact date. It was after I had received a copy of the letter from them to Mr. Gardner, at which time I learned they had accepted delivery. (Witness leaving stand and returning with file.) On August 19, 1948. I have a copy of the letter here.
>
> Q. (Counsel examining letter.) Can you point out where it says that it was sent in mistake? I can't read that.
>
> A. It says: 'As Mr. Gardner is explaining to you, this is not altogether true. It is true that this particular order came to you on an open account basis, but it was done through an error of an inexperienced clerk at the plant of Newkirk Manufacturing Company at Anaheim.'
>
> Q. Well, that wasn't notifying them that it was sent through error and asking them to take care of the situation or anything like that, was it?
>
> A. I believe I asked them to pay for the shipment at the time.
>
> Q. Well, don't you always ask for the payment of open accounts if they are not paid within—
>
> A. (Interposing): Not always" (R. 34-35).

The letter (Exhibit 13), dated September 28, 1948, also written by Mr. Allen, states:

> "On August 19, 1948, we wrote to you about the balance of $13,101.09 open on your account with us, with particular reference to the carload shipment which was made to you on July 30th on an open account basis" (R. 55).

Thus, in the above quoted testimony, respondent's Credit Manager acknowledged having made a demand for payment at the time (viz., August 19, 1948), and substantially admits such a demand in his said letter of September 28, 1948.

QUESTIONS PRESENTED

At page 5, respondent suggests a rephrasing of the first of the "Questions Presented", set forth at page 4 of the Petition for Writ of Certiorari. Petitioner does not concur in respondent's suggestion as to how that question should be rephrased. It begs the question and does not present the issues that the petitioner seeks to have this Court review.

ARGUMENT

A.

Reference is made to petitioner's original brief, pages 24-28, for a statement of petitioner's position with respect to the application of Sections 9(a) and 9(c) of the Federal Bills of Lading Act, and to pages 28-30 for a statement of its position on the question of ratification.

With respect to Sections 9(a) and (c), briefly summarized, petitioner claims that, under the undisputed evidence, respondent must be deemed to have accepted, (or is estopped to deny acceptance), the order for the goods of Hickman Farm Supplies, Inc. upon the terms specified in the purchase order (Exhibit 12), viz., "OPEN". Further, the forwarding of the bill of lading directly to Hickman Farm Supplies, Inc. by Newkirk Manufacturing Company, respondent's agent for making the shipment, was acquiesced in and ratified by respondent (or respondent is estopped to deny ratification), resulting in a transfer of the bill of lading under Section 29 of the Federal Bills of Lading Act. In that connection, respondent failed to notify Hickman Farm Supplies, Inc. that its order "OPEN" was not accepted, nor did respondent notify Hickman Farm Supplies Inc., of an error of its said agent in forwarding the bill of lading directly to Hickman Farm Supplies, Inc., until after delivery of the goods, although it had knowledge of that error for upwards of twelve days prior to the time of delivery. Further, petitioner claims that respondent could have suffered no damages by reason of the alleged misdelivery by your petitioner of the goods, and, therefore, petitioner is not liable to respondent under Section 10 of the Federal Bills of Lading Act, and the decision of this

Court in *Pere Marquette R. Co. v. J. F. French & Co.*, 254 U. S. 538, 546-547). In the case at bar, respondent is the seller of the goods, under whose direction the shipment was made, and respondent is not in the position of a third party, to whom the bill of lading had been negotiated for value and without notice.

B.

At pages 10, and 12-14, respondent refers to the cases of *Keystone Grape Co. v. Hustis*, 232 Mass. 162, 122 N. E. 269, and *Davis v. Fruita Mercantile Co.*, 74 Col. 247, 220 P. 983.

In the footnote at page 12, respondent quotes the surrender clause so-called, of the bill of lading, and says:

> "Although petitioner recites in its brief that the bill of lading (Exhibit 7) bore the statement,
>
> > 'The surrender of this Original ORDER Bill of Lading properly endorsed shall be required before the delivery of the property,'
>
> counsel makes no reference or comment upon its significance throughout their entire brief. Counsel for petitioner completely ignore this provision in their Argument and the contention that they urge contradicts this language."

In also quoting the same provision of the bill of lading, in the footnote at page 6 of the opposition brief, counsel makes the following comment:

> "Petitioner has substantially ignored this provision and suggests no method of avoiding these contractual obligations, a provision which is not prohibited by law or contrary to express legislative intent."

It is apparent that respondent relies upon the proof that it did not actually place the typewritten endorsement of its name on the bill of lading or specifically authorize it, and claims this, of itself without anything more, renders petitioner liable in conversion. That claim is contrary to the decision of this Court in *Pere Marquette R. Co. v. J. F. French & Co.*, 254 U. S. 538, 546-547, cited at pages 21-22 of petitioner's original brief. At page 546 of the opinion in that case, the question is there posed:

> "Does a delivery without compliance with the surrender clause of the bill of lading render the carrier liable for conversion under the facts shown here?"

This question is answered, at page 547. It is there said:

> "But where delivery is made to a person who has the bill or who has authority from the holder of it, *and the cause of shipper's loss is not the failure to require surrender of the bill, but the improper acquisition of it by the deliveree or his improper subsequent conduct,* the mere technical failure to require presentation and surrender of the bill will not make the delivery a conversion. • • •
>
> "Similarly, in the case before us, the failure of the carrier to require production and surrender of the bill of lading did not cause the loss. *The same loss would have resulted if the bill had been presented and surrendered. The real cause of the loss was the wrongful surrender of the bill* of lading by the Indianapolis bank to Marshall & Kelsey" • • •. (Emphasis supplied.)

and at page 548, it is said:

> "The delivery was made to one in possession of the bill of lading who could, and doubtless would, have surrendered it, had he not been prevented by

> distance from doing so. *To hold a carrier liable under such circumstances would seriously interfere with the convenience and the practice of business.*" (Emphasis supplied.)

Obviously this Court, in its above decision in *Pere Marquette R. Co. v. J. F. French & Co., supra,* was greatly concerned with the effect that a contrary decision would have upon the *convenience and practice of business.* The Michigan Supreme Court did not give the same consideration to the facts in the case at bar, and if its decision be allowed to stand, it would mean that hereafter carriers could not safely rely upon endorsements on order bills of lading, valid upon their face, in delivering goods upon surrender of such order bills of lading. Carriers would then be forced to require specimen signatures of all persons, authorized to sign bills of lading, or in lieu thereof, require indemnity bonds or similar undertakings to protect themselves from liability for conversion. Such a burden would be intolerable, not only to the carriers but to the shippers, and would be a serious detriment to the normal flow of business.

In support of its position that petitioner is liable in conversion because, under its claim, the bill of lading was not properly endorsed, respondent quotes, at pages 13-14, from the case of *Davis v. Fruita Mercantile Co., supra,* in part, as follows:

> "The converse is necessarily true, that the carrier is not justified if the bill is not properly indorsed, * * *. The court several times repeats, as if by way of emphasis, that the order bill of lading in that case was indorsed in blank by the consignee, which, of course, brings the case clearly within the purview of subdivision 'c', section 9. There is

> nothing in the opinion or in the statement of the facts in the *French (Pere Marquette Ry.)* case that indicates that the decision of the Supreme Court would have been as it was, unless the order bill of lading was properly indorsed. Until that court otherwise decides, we shall hold that the rule laid down in the *French (Pere Marquette Ry.)* case, and with the exception in that opinion noted, is applicable only where the order bill of lading is properly indorsed * * *."

The statement of law, above quoted, is in broad general terms, and should be restricted in its application to the facts in that case. It should be noted that the facts in *Davis v. Fruita Mercantile Co., supra,* are distinguishable from the facts of the case at bar, in that the shipper in that case, not as in the case at bar, sent the bill of lading with draft attached for collection through a bank, thereby evidencing an intention to reserve title until the draft was paid, *Annotation 60, A. L.* R. 677; and also the bill of lading in that case, not only was not surrendered to the carrier bearing shipper's purported endorsement, as was done in the case at bar, but was returned to the collecting bank, which further evidenced an intention that there should be no change in title.

We claim that a careful perusal of *Davis v. Fruita Mercantile Co., supra,* shows that the Court in that case recognized the ultimate question determining carrier's liability was whether the party, to whom the goods were delivered, was entitled to possession of the goods. At page 250 (Colorado Reports), the Court says:

> "Still further condensed, and otherwise phrased, the question is, was the Harris Brothers Grain Company, having physical possession of an unendorsed bill of lading, under the facts stipulated, lawfully entitled to the possession of the hay?"